UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

El Paso Natural Gas Company | Docket Nos. RP00-336-008 and RP00-336-009

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued October 27, 2003)

1. On December 26, 2002, the Commission issued an order[1] in this proceeding (December 26 Order) that accepted, subject to conditions, El Paso Natural Gas Company's (El Paso) filing to implement the California Receipt Service and partial reservation charge crediting. Timely requests for rehearing and clarification of that order were filed by El Paso; BP America Production Company and BP Energy Company (BP America); Blythe Energy, LLC (Blythe); Texas Gas Service a division of ONEOK, Inc. (Texas Gas); and jointly by the Arizona Corporation Commission and the Full Requirements Shippers (FR Shippers).[2] The requests for rehearing are denied and the requests for clarification are granted as discussed below.

2. On January 10, 2003, El Paso filed tariff sheets[3] in Docket No. RP00-336-008 to comply with the December 26 Order. The Commission will accept El Paso's compliance filing effective November 1, 2002 as proposed, subject to the modifications discussed

[1] 101 FERC ¶ 61,379 (2002).

[2] For purposes of this request for rehearing, the FR Shippers are Arizona Electric Power Cooperative, Inc.; Arizona Gas Division of Citizens Communications Company; Arizona Public Service Company and Pinnacle West Energy Corporation; El Paso Electric Company; El Paso Municipal Customer Group; Phelps Dodge Corporation; Public Service Company of New Mexico; Salt River Project; and Southwest Gas Corporation.

[3] The Appendix lists the compliance tariff sheets submitted to incorporate the revisions required by the December 26 Order. The Appendix also lists the remaining sheets accepted that were without changes by the December 26 Order.

below. This decision is in the public interest because it will make additional capacity available on El Paso's system through backhauls and exchanges and will provide reservation charge credits when El Paso is unable to provide firm service.

I. Background

3. On May 31, 2002, the Commission issued an Order on Capacity Allocation and Complaints (May 31 Order)[4] in this proceeding which, among other things, required that the full requirements (FR) contracts on El Paso be converted to contract demand (CD) contracts effective November 1, 2002. In that order, the Commission stated that it would require El Paso to immediately allow the use of its California delivery points as receipt points to promote exchanges from off-system deliveries. The Commission also directed El Paso to pay reservation charge credits to its firm shippers for reservation charges for any firm service that it cannot schedule for reasons other than force majeure, after November 1, 2002.

4. On September 20, 2002, the Commission issued an Order on Clarification and Adopting Capacity Allocation Methodology (September 20 Order).[5] This order extended the effective date of the conversion of FR service from November 1, 2002 to May 1, 2003 and set forth the methodology to be used by El Paso in converting the FR contracts to CD contracts. The Commission also directed El Paso to pay its CD shippers partial reservation charge credits for the interim period from November 1, 2002 to May 1, 2003 whenever El Paso is unable to deliver 95 percent of the shipper's nominated quantity out of any basin for reasons other than force majeure. The Commission stated that the amount of the credit shall equal the amount of the equity return and income taxes associated with it that is included in the reservation charge. The September 20 Order also clarified that reservation charge credits will apply to pro rata allocations during nomination Cycle 2 and Cycle 3 because pro rata allocations of primary firm shippers' confirmed nominations during Cycles 2 and 3 would be due to El Paso's inability to serve all of its CD shippers on primary basis.[6]

[4] 99 FERC ¶ 61,244 (2002).

[5] 100 FERC ¶ 61,285 (2002).

[6] The North American Energy Standards Board (NAESB) standards provide for four nomination cycles. Cycle I, timely nominations, are due at 11:30 a.m. and Cycle 2, evening nominations, are due at 6 p.m. for gas flow at 9 a.m. the following day. Cycle 3, the first intra-day nominations, are due at 10 a.m. for gas flow at 5 p.m. the same day. Cycle 4, the second intra-day nominations, are due at 5 p.m. for gas flow at 9 p.m. the same day.

5. The September 20 Order directed El Paso to file tariff sheets to allow for the immediate use of California delivery points as receipt points.

6. On December 26, 2002, the Commission issued an order which accepted, subject to conditions, El Paso's filing to implement the California Receipt Service and to institute partial reservation charge credits for the interim period until the implementation date of the conversion of FR to CD service. The Commission found that the proposed reservation charge for the California Receipt Service was appropriate only for new shippers, if El Paso can provide the service to any new shippers without affecting service to existing firm shippers. The Commission required El Paso to file revise tariff sheets to remove the geographical limitations to the service, if it is operationally feasible, and to narrow the circumstances in which partial reservation charge credits are inapplicable.

7. On July 9, 2003, the Commission issued an order that generally denied the requests for rehearing of the May 31 and September 20 Orders. Also on July 9, 2003, the Commission issued an order that accepted El Paso's December 3, 2002 allocation report and its March 31, 2003 compliance filing, subject to certain modifications. On August 29, 2003, the Commission issued an order accepting and suspending, subject to conditions, El Paso's August 1, 2003 filing to comply with the July 9 Orders. The August 29 Order allowed the proposed tariff sheets to go into effect to implement the conversion of FR service to CD service on September 1, 2003, and directed Commission staff to convene a technical conference to discuss the issues raised by the protestors.

8. This order addresses the requests for rehearing of the Commission's December 26, 2002 Order and El Paso's January 10, 2003 filing to comply with that order.

II. The Requests for Rehearing

9. In their requests for rehearing, El Paso, Blythe, BP America, the FR Shippers and Texas Gas raise issues concerning the California Receipt Service and reservation charge credits. Blythe also filed a petition to intervene out of time. These issues are discussed below.

A. Late Intervention

10. In its petition for late intervention, Blythe states that it is scheduled to begin operation as a wholesale electric generation facility in January 2003 and is a new shipper on El Paso. Blythe asserts that good cause exists for the Commission to grant late intervention because its interest in the proceeding arose after the intervention date. Blythe further asserts that its late intervention will not disrupt the proceeding, cause prejudice to, or impose additional burdens on the parties because Blythe agrees to accept the record in this proceeding as it has developed prior to its intervention.

11. In determining whether to grant late intervention pursuant to Rule 214(d) of the Commission's Rules of Practice,[7] the Commission considers whether good cause has been shown for failing to file the motion within the prescribed time, whether any disruption of the proceeding might result from granting the late intervention, whether the movant's interest is adequately represented by other parties to the proceeding, and whether any prejudice to or additional burdens upon existing parties might result from the late intervention.

12. The Commission finds that Blythe's status as a new shipper on El Paso provides good cause for the late intervention. Further, Blythe has raised a single issue on rehearing with regard to reservation charges for new shippers using California Receipt Service. The resolution of this issue will not impact the existing shippers on El Paso that have participated in this proceeding from its inception and will not place any additional burdens on these parties.

13. The Commission will therefore grant the request to intervene out of time. Consistent with Rule 214, Blythe must accept the record as it has been developed in this proceeding. Further, the Commission will limit Blythe's intervention to the single issue that it has raised with regard to reservation charges for new shippers for El Paso's California Receipt Service. This limited intervention will not delay or disrupt this proceeding, or unduly prejudice other parties.

B. California Receipt Service

1. Reservation Charges for New Shippers

14. In the December 26, the Commission rejected El Paso's proposal to charge existing customers an Out-of-Zone Daily Reservation Charge for the California Receipt Service for the remainder of the term of a 1996 Settlement, i.e., through 2005.[8] The Commission explained that it had ordered El Paso to provide this service flexibility because El Paso had not been able to provide reliable firm service to existing shippers, and that the California Receipt Service will aid in serving nominations within the shippers' existing contracts for which they are already paying reservation charges.

15. With respect to new shippers, the Commission found that the proposed Out-of-Zone Reservation Charge is appropriate, if El Paso can provide the California Receipt

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[7] 18 C.F.R. § 385.214(d) (2003).

[8] See 79 FERC ¶ 61,028, reh'g denied, 80 FERC ¶ 61,084 (1997).

Service to new shippers without affecting service to existing shippers.[9] If a new shipper has contracted for service at a zone rate other than the California zone delivery rate, it is appropriate for El Paso to charge the Out-of Zone Daily Reservation Charge if that shipper opts to use California receipt points. If, however, the new shipper has contracted for service at the California zone delivery rate, the Out-of-Zone Daily Reservation Charge would not apply. The Commission explained that the reservation charge is consistent with El Paso's current backhaul rates and, like those backhaul rates, is equal to the applicable forward haul rate. The Commission also explained that in appropriate circumstances, it permits pipelines to use an existing rate for similar service until the next rate case.

16. On rehearing, Blythe argues that the Commission erred in removing the reservation charge associated with California Receipt Service only for existing shippers, and that the Commission should reject the proposed reservation charge for all shippers when they nominate the California receipt points on an alternate basis using existing transportation agreements. Blythe states that it and its prospective gas suppliers are interested in contracting for firm service on El Paso and would like the flexibility to perform a backhaul off the Ehrenberg California delivery point on an alternate firm basis. Blythe states that the Commission's order results in undue discrimination and puts Blythe at a competitive disadvantage because it provides different rate structures for new and existing shippers and gives existing shippers, who will be exempt from reservation charges, an advantage over new market entrants.

17. In the December 26 Order, the Commission intended that all shippers be able to use the California delivery points at Ehrenberg and Topock as receipt points on an alternate basis in order to provide additional service flexibility to shippers, and to mitigate west flow constraints by promoting exchanges from off-system deliveries. The Commission determined that this added flexibility should not cost the existing shippers any additional amount due to zone differences in delivery because the Commission had not changed the 1996 Settlement rates. The Commission also envisioned that this added flexibility could aid in the transition from full requirements service and full system-wide

[9] The Commission found that El Paso had not demonstrated that it has the capacity to serve new shippers under this service, and required El Paso to file with the Commission any new contract to provide California Receipt Service to a new shipper and to demonstrate in that filing that it has sufficient capacity to serve that new shipper.

receipt point flexibility to the new contract demand service with designated primary and secondary receipt point rights.[10]

18. With respect to Blythe's concern that it is discriminatory not to charge converting FR customers a zone differential rate, the Commission disagrees. The Commission concludes that in order to preserve the bargains reflected in the 1996 Settlement, and to ensure the converted FR customers are able to serve their new CD contracts, it would be inappropriate to add an out-of-zone reservation charge to those shippers . New contract demand customers were not part of the 1996 Settlement and accordingly are obligated to pay the approved effective tariff rates, including any applicable out-of-zone charges consistent with Commission policy.[11]

19. In contrast, consistent with Commission policy, the alternate receipt point flexibility provided under the California Receipt Service does not contemplate allowing a shipper to nominate overlapping forward and backhauls that exceed the contract demand. Amounts in excess of current contract rights or a new firm backhaul service would require a separate backhaul service contract with designated primary receipt and delivery points. Such a contract would require any shipper utilizing such service, whether a former FR customer or an existing CD shipper, to pay additional charges for that new service.

2. Geographical Limitations

20. El Paso proposed to limit its California Receipt Service by confining northern system receipt points in the Topock area to northern system delivery points and southern system receipt points in the Ehrenberg area to southern system delivery points. El Paso stated that these limitations would ensure that no forward haul transportation would be necessary to provide the displacement service and that the rights of other firm shippers would not be adversely affected. In the December 26, 2002 Order, the Commission recognized that it may not be operationally feasible for El Paso to provide the service without north/south limitations in all cases, but stated that it appears that there are situations where service between the north and south points could be operationally feasible by displacement or exchange. Therefore, Commission directed El Paso to provide this service without geographic limitations where operationally feasible.

[10] The California Receipt Service is available without additional reservation charge to any customer that is paying the California zone rate. For new customers that do not pay the California zone rate, El Paso's out-of-zone reservation charge will apply.

[11] In any event, Blythe is not disadvantaged since it would pay the California zone rate and it would be able to obtain the California Receipt Service without an additional reservation charge, if El Paso has the capacity to provide the service.

El Paso, the FR Shippers, and Texas Gas seek rehearing or clarification of the Commission's ruling on this issue.

21. The FR Shippers and Texas Gas argue that the Commission's ruling gives El Paso complete discretion to impose north/south restrictions on its backhaul service, and that El Paso has taken advantage of that discretion in its compliance filing.[12] They assert that this is error because El Paso has a section 4 burden of proof to show that its proposed restrictions are just and reasonable, and El Paso provided no justification for imposing any such limitations. These protestors state that El Paso's sole basis for imposing the north/south restriction is to avoid a constraint on the Havasu Crossover Line to the detriment of forward haul shippers on that line. However, they assert, flow diagrams filed by El Paso in connection with its Power-Up Project[13] show that any operational constraints that may have historically existed on the Havasu Line no longer restrict service on that line and current flow conditions demonstrate that there is sufficient capacity on the north and south systems to honor all CD obligations in effect at Topock and Ehrenberg without any substantial use of the Havasu Crossover. The FR Shippers argue that the Commission is not performing its statutory duty of ensuring the reasonableness of the proposal if it defers to the concept of operational feasibility without examining the facts.

22. In its request for rehearing, El Paso states that its compliance filing conforms to the requirement that it provide the California Receipt Service without geographic limitations where operationally feasible, and further states that it will endeavor to provide the service without north/south limitations. However, El Paso states that because it does not have any experience upon which to assess whether this is operationally feasible, it reserves the right to return to the Commission if it determines that it cannot perform the service without the geographic limitations.

23. Commission policy requires that pipelines allow customers to contract for available, unsubscribed capacity. As with any firm service, El Paso may not offer or provide service if doing so threatens or impinges on the prior commitments of other firm services. Displacement capacity that underlies backhaul service relies on predictable forward-hauls of gas. As such, the Commission has not required any pipeline to provide specified levels of such service. However, parties could explore this issue in El Paso's next general rate proceeding.

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[12] The FR Shippers cite pro forma Original Sheet No. 219E, § 4.9(c), which provides: California Receipt Service shall be provided only when it is operationally feasible by mainline displacement or exchange."

[13] See El Paso Natural Gas Pipeline Co., 101 FERC ¶ 61,280 (2003).

24. El Paso has stated that it will provide the California Receipt Service without geographical limitations where the physical limitations of its system permit it to do so. The Commission will not require El Paso to do more. There have been capacity constraints on the crossovers between the north and south systems,[14] and El Paso must provide the California Receipt Service within the physical realities of its system. Contrary to the allegations of the FR Shippers and Texas Gas, the Commission's ruling does not give El Paso complete discretion to impose geographic restrictions on the California backhaul service, but permits restrictions where they are required by operational considerations.

25. The FR Shippers are also concerned that an example given by the Commission of circumstances where the California Receipt Service could be provided without geographical limitations[15] might provide El Paso with a basis for limiting backhaul receipts to these circumstances. The example given by the Commission does not limit El Paso's obligation to provide the service without north/south limitations when it is operationally feasible and does not result in the restrictions suggested by the FR Shippers. The requests for rehearing are denied.

3. Use of Forward Haul

26. El Paso states that in providing the California Receipt Service without geographical limitations, some portion of the service provided to particular shippers will likely be accomplished by a forward haul, and asks the Commission to clarify that this is permissible. El Paso states that use of a forward haul is likely because gas physically flows south from the northern mainline to the southern mainline via the Havasu or Maricopa crossovers and from Valve City to Plains Station on the east end of the system. In addition, El Paso states, most deliveries are accomplished by physical forward-haul flow on delivery laterals.

27. El Paso is concerned that without the north/south geographical restrictions, the backhauls will involve the use of the limited capacity on the crossovers between the two systems and, under the scheduling priorities in its current tariff, could result in claims that

[14] Article 10.2 of the 1996 Settlement recognizes these constraints and specifically provides that for as long as the capacity constraints continue, El Paso shall not sell additional firm capacity rights through constrained north-south crossover facilities. In addition, on September 24, 2003, a technical conference was held in this proceeding that addressed, among other things, how these capacity constraints on the crossovers impact the use of Block capacity for deliveries to east of California delivery points.

[15] 101 FERC ¶ 61,379 at P.25.

the California Receipt Service is adversely impacting the rights of forward haul shippers. El Paso provides the following example:

> (i) Shipper A nominates gas receipts in the San Juan Basin for delivery at Ehrenberg using its primary rights. The gas to Shipper A's nomination physically flows from the receipt point through Valve City to Franconia Junction, then south on the Havasu crossover for delivery at Ehrenberg.
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> (ii) Shipper B nominates gas receipts at Topock (alternate receipt rights) for delivery to Phoenix. The gas flows from the receipt point at Topock by backhaul displacement to Franconia Junction, but it also physically flows south on the Havasu crossover.

28. El Paso states that in this example, because Shipper A is using its primary rights, Shipper A would receive scheduling priority under El Paso's tariff over Shipper B's nominations in the same cycle. However, if Shipper A nominates in a later cycle (Intraday I or II) where earlier alternate transactions have filled the crossover and cannot be bumped, then Shipper B would retain its previously scheduled capacity on the Havasu crossover, and the forward haul service to Shipper A would not be scheduled. Finally, El Paso states that in this example, if both Shipper A and Shipper B were alternate shippers, then Shipper A, a forward haul shipper, and Shipper B, a backhaul shipper, would have equal priority to the Havasu crossover in a given cycle and would share it pro rata in the event of a capacity constraint.

29. El Paso states that in light of these potential circumstances, it is concerned that providing the California Receipt Service as directed may be seen as adversely affecting forward haul service in contravention of the Commission's May 31 Order.[16] El Paso asks the Commission to clarify that its implementation of the service is fully consistent with the Commission's directives.

30. The Commission clarifies that El Paso's proposed implementation is consistent with El Paso's tariff and Commission policy. We note however, on October 2, 2003, El Paso filed a proposal in Docket No. RP04-19-000 to change its firm service scheduling priority from a two-tiered scheme to a five-tiered scheme.

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[16] In the May 31 Order, the Commission stated that "pipelines are not required to accept or permit backhaul transactions to the extent such transactions would negatively impact forward haul transactions or could not be operationally guaranteed." 99 FERC at 62,012 (2002).

31. The Commission's action on this proposal could impact the scheduling priorities for the California Receipt Service. The Commission will address further issues of scheduling priorities in response to that filing.

4. The North Baja/Ehrenberg Point

32. The FR Shippers request that the Commission clarify that the new pipeline interconnection between El Paso and North Baja Pipeline, LLC is a California transportation delivery point, and, therefore, is a California point for purposes of eligibility under Section 4.9 of the GT&C. The FR Shippers ask the Commission to direct El Paso to revise Section 4.9 to specifically include the North Baja/Ehrenberg point.

33. In its response to the protests, El Paso clarifies that California receipt service is available at North Baja/Ehrenberg, and that when the tariff states that the California Receipt service will be from all Ehrenberg points, this includes the north California delivery point known as North Baja/Ehrenberg.

34. In view of El Paso's clarification, we conclude that no amendment of the tariff language is necessary.

5. Fuel Charge

35. El Paso's compliance filing provides that no fuel will be charged for the California Receipt Service since it is to be effectuated by backhaul displacement, and El Paso states that it currently plans to provide this service without a fuel charge. However, El Paso states, since the service is likely to include portions of forward haul transportation, experience may demonstrate that fuel is actually consumed in providing the service. Therefore, El Paso states, it reserves the right to return to the Commission to make a filing if experience demonstrates that California Receipt Service is being used in a manner that fuel is being consumed. El Paso requests the Commission to clarify that the December 26 Order did not change the tariff requirement that El Paso charge no less than actual fuel in the provision of the California Receipt Service.

36. The Commission clarifies that it did not change El Paso's tariff provisions regarding the fuel charge.

6. Availability of California Receipt Service to Production Basin-Only Shippers and Delivery Lateral-Only Shippers

37. El Paso asks the Commission to clarify that the California Receipt Service is not available to production basin-only shippers or delivery lateral-only shippers. Without this clarification, El Paso states, a shipper with firm rights to receipt and delivery points within the east-end production areas could argue that the Commission's

December 26 Order gives it the right to flow gas from California receipt points to the Anadarko Basin without paying an additional reservation charge. However, El Paso states, these exclusively east end shippers did not enter into their Transportation service agreements (TSA) with the expectation that west-flow mainline rights would be handed to them later. Instead, these shippers made arrangements that required the use of only the eastern portion of El Paso's mainlines to effectuate the transactions, and, in return, their rates were often discounted. El Paso states that it would not be reasonable to give these production basin-only shippers access to the California Receipt Service when they have not contracted for, paid for, or had any reasonable expectation of access to the western portion of El Paso's system. Similarly, El Paso states, shippers who have contracts for transportation on specific delivery laterals only should not be given rights to use the capacity on the mainline without paying a reservation charge.

38. As explained above, the California Receipt Service is intended to provide additional receipt point flexibility for mainline shippers under existing contracts. It was not intended to allow shippers to expand the scope of contracts that limit service to a specific production area or lateral. The Commission clarifies that the California Receipt Service is not available without an additional charge to production basin-only shippers or lateral-only shippers that do not pay the California zone rate.[17] If these shippers seek to use the California delivery points as alternate receipt points, they must pay El Paso's out-of-zone reservation charge to do so.

C. Partial Reservation Charge Credits

39. The Commission required El Paso to provide partial reservation charge credits for the interim period beginning November 1, 2002 through the date of the contract conversions. El Paso's compliance filing set forth the circumstances when reservation charge credits will be paid and also provided certain exceptions to the reservation charge crediting requirements. Specifically, El Paso's filing provided that no reservation charge credits would be owed when El Paso's failure to schedule is due to providing service to a higher priority shipper, when the failure to schedule is the result of the shipper's failure to perform in accordance with the terms of its TSA or El Paso's tariff, or when El Paso declares a force majeure event. In the December 26 order, the Commission found that some of these exemptions were overly broad and directed El Paso to remove the language providing that credits will not be due when El Paso's inability to schedule is due to El Paso serving a higher priority shipper or the shipper's failure to perform in accordance

[17] However, as explained below in the discussion on El Paso's January 10 compliance filing, California Receipt Service is available to shippers with receipt points in the San Juan Basin and primary delivery rights in the east end of the system.

with its TSA or the tariff, or more narrowly define the circumstances when credits are inapplicable.

1. Exemption for Laterals

40. On rehearing, El Paso asks the Commission to provide for an exception to the reservation charge crediting requirements related to scheduling capacity on El Paso's delivery laterals. El Paso states that the Commission has recognized that when point capacity has been filled by shippers with primary rights, it is not appropriate to require El Paso to pay reservation charge credits when alternate shippers with lower priorities cannot be scheduled to that point. El Paso states that the same situation exists with regard to lateral capacity on El Paso's system. El Paso states that its delivery laterals were constructed to meet the needs of specific customers with delivery points on those laterals and because of this, the delivery point capacity on the lateral may exceed the capacity of the lateral itself. El Paso states that customers with primary rights to the lateral understood and accepted this physical reality when they entered into TSAs for service on those laterals. El Paso further states that in many instances, shippers served by a lateral have load patterns that do not peak coincidently, and thus the lateral was sized to have less throughput capacity than the aggregate capacity of the delivery points it serves. El Paso argues that when primary shippers are scheduling the full capacity on their delivery laterals, it is inappropriate to require El Paso to pay reservation charge credits to lower priority shippers who are precluded from scheduling through that lateral. Therefore, El Paso requests clarification or rehearing that when shippers with higher priority rights to delivery points on a delivery lateral are fully utilizing that lateral's capacity, El Paso does not have to pay partial reservation charge credits to shippers with lower priority rights.

41. Shippers who pay reservation charges for primary firm service on lateral lines should receive reservation charge credits when they cannot schedule the primary firm service for which they have contracted. El Paso should not contract for more firm service than it can provide. If it is unable to serve a customer's firm service entitlement, it must pay reservation charge credits. El Paso's request for rehearing is denied.

2. Reservation Charge Credits for Discounted Rates

42. El Paso's compliance filing provides that in establishing the amount of the credit for discounted rates, the first portion of the rate discounted shall be deemed to be the equity return and tax portion. Therefore, under El Paso's proposal, the credit will apply to that portion of the discounted rate that exceeds 74.37 percent of the maximum rate. In accepting this portion of El Paso's compliance filing, the Commission stated that a discount granted by the pipeline comes out of the pipeline's return on equity and, therefore, the discounted shipper is already receiving a partial credit in its discounted rate.

43. BP America asks the Commission to grant rehearing and require El Paso to refund the entire profit component (25.63 percent of the daily base contract reservation rate) to a firm shipper whose nominations cannot be scheduled regardless of whether the shipper is paying a discounted firm rate or a maximum firm rate. BP America argues that the Commission's reasoning fails to take account of the fact that El Paso's maximum rates were designed by including an adjustment for discounts and that El Paso has already been kept whole for any discounts it may grant. In addition, BP America asserts, El Paso has been recovering millions of dollars in excess of its cost of service on an ongoing basis.[18] Thus, BP America asserts, there is no question that El Paso has fully recovered the profit component of its discounted rate and has in fact overrecovered the profit component. BP America states that the discounted shipper, just like the maximum rate shipper is paying for firm service it is not receiving through no fault of its own, and that it is unjust and unreasonable for the Commission to permit El Paso to retain a portion of the profit component of its rates when making a partial reservation charge credit.

44. The request for rehearing is denied. The Commission has directed that in providing partial reservation charge credits, El Paso may retain the portion of its rate that recovers its cost of service, and must refund the portion that is equal to the amount of the equity return and the income tax associated with it that is included in the reservation charge.[19] El Paso has explained that its cost of service is equal to 74.37 percent of its maximum rate and that in the case of a discounted rate it will refund the portion that exceeds this amount. It is appropriate that El Paso refund the portion of the rate that represents its profit, and since there is less profit when the rate is discounted, the amount of the credit is less in those circumstances. The Commission will not require that El Paso return a portion of its cost of service in providing the partial reservation charge credits. Issues related to any over recovery of the cost of service can be addressed in the next rate case, but are not relevant to the calculation of the partial reservation charge credit in the interim.

III. El Paso's January 10, 2003 Tariff Filing

45. El Paso's January 10 filing is intended to comply with the directives of the December 26 Order. The filing provides that the incremental reservation charge will be

[18] BP states that under the terms of the settlement, El Paso is required to provide revenue credits equal to 35 percent of total revenues that exceed an annual threshold amount in the tariff on an annual basis, and that for 2001, the most recent revenue crediting period, that threshold amount is $36,673,739; El Paso filed to credit its shippers revenues totaling $47,393,016.

[19] 100 FERC ¶ 61,285 at P.15 (2002).

applicable only to new shippers, removes the geographic limitations proposed for the California Receipt Service, and more narrowly defines the circumstances in which partial reservation charge credits would be inapplicable.

A. Public Notice, Interventions, and Protests

46. Public notice of El Paso's January 10 compliance filing was issued on January 15, 2003. Interventions and protests were due as provided in Section 154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2002)). Protests were filed by the Full Requirements Shippers (FR Shippers),[20] the Indicated Shippers,[21] and Pacific Gas and Electric Company (PG&E). The protestors raised issues relating to the availability and mechanics of the California Receipt Service and the applicability of the reservation charge credit. El Paso filed an answer to the protests on January 30, 2003.

B. California Receipt Service

47. The December 26 Order found that it was not appropriate to charge existing shippers a new incremental reservation charge for the California Receipt Service through the term of the Settlement in Docket No. RP95-363-000, but that the proposed reservation rates are appropriate for any new shippers, if El Paso can provide that service without affecting service to existing firm shippers. The Commission therefore required El Paso to file with the Commission any contract to provide California Receipt Service to any new shipper and to demonstrate in that filing that it has sufficient capacity to serve that new shipper. The Commission also required El Paso to remove the geographic limitations to the service so that service would be provided if operationally feasible. El Paso has revised Sheet No. 219E to provide that the incremental reservation charge for the California Receipt Service is applicable only to new shippers, defined in Section 4.9(c) as shippers entering into a contract after November 1, 2002. El Paso has removed the geographic limitations from Section 4.9 and added the provision that the service will be provided only if operationally feasible.

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[20] For purposes of this pleading, the FR Shippers are Arizona Electric Power Cooperative, Inc.; Arizona Gas Division of Citizens Communications Company; Arizona Public Service Company and Pinnacle West Energy Corporation; BHP Copper, Inc.; El Paso Electric Company; El Paso Municipal Customer Group; Phelps Dodge Corporation; Public Service Company of New Mexico; Salt River Project; and Southwest Gas Corporation.

[21] For purposes of this pleading, the Indicated Shippers are Aera Energy, LLC; BP America Production Company and BP Energy Company; Burlington Resources Trading Inc.; Conoco Phillips Company; Coral Energy Resources, LP; Occidental Energy Marketing, Inc.; and Texaco Natural Gas Inc.

48. The protestors request that El Paso clarify its definition of new shippers. PG&E seeks clarification that a new shipper does not include shippers who have acquired or assumed certain existing contractual rights. The Indicated Shippers similarly request clarification that "new shipper" does not include a shipper entering into a contract as a result of capacity release, a right of first refusal (ROFR), or rollover under an evergreen provision. The Indicated Shippers request that the Commission require El Paso to modify Section 4.9(c) to include the following language (in underlined text):

> "any shipper entering a contract after November 1, 2002, except for shippers executing a replacement contract as a result of the reallocation of capacity rights in the Docket No. RP00-336-002 proceeding, replacement shippers under capacity release or assignment, shippers exercising evergreen or rollover rights in their contracts, and shippers exercising their right of first refusal."

49. In its response, El Paso agrees with the Indicated Shippers' clarification. The Commission finds that it is not appropriate to treat existing shippers in a manner different from shippers who acquire the capacity through capacity release, ROFR, or evergreen provisions. The Commission thus requires El Paso to modify Section 4.9(c) as suggested by the Indicated Shippers.

50. Indicated Shippers also request clarification that East End shippers, i.e., those shippers whose primary delivery points are in the east end of the system, should be entitled to utilize the California Receipt Service without charge until the next rate case. El Paso agrees that a shipper with primary receipt rights in the San Juan Basin and primary delivery rights in the east end of the system should be entitled to the service.[22] This is consistent with our holding that shippers that were customers on the El Paso system on November 1, 2002, except for production basin-only shippers and lateral-only shippers, should receive the California Receipt Service without an additional reservation charge and this resolves Indicated Shippers' concern.

51. Indicated Shippers further request that volume limitations for the California Receipt Service should be subject to operational feasibility rather than maximum daily contract quantities. They argue that it would be discriminatory to limit CD shippers to their contract demand limits and not limit FR shippers, who have no contract demand limits. El Paso replies that the December 26 Order states that the service is to be

[22] El Paso notes that in its request for rehearing and clarification it asked the Commission to clarify that it would not be appropriate give production basin-only and delivery lateral-only shippers access to California Receipt Service. As discussed above, the Commission has granted El Paso's request for clarification.

provided within the existing contracts for which shippers are already paying a reservation charge. El Paso requests that the Commission dismiss Indicated Shippers' request. The Commission finds that it is appropriate to limit the California Receipt Service to a shipper's contract demand. This limit is not discriminatory in that the FR shippers have converted to CD service on September 1, 2003 and have volume limits to their service. The Commission thus denies Indicated Shippers' request to eliminate volume limitations on the California Receipt Service.

52. The FR Shippers state that El Paso's proposed tariff modifications do not reflect the requirement that service to new shippers is conditioned upon a finding that such new service will not adversely affect service to existing firm shippers, nor does it reflect El Paso's obligation to file any contracts to provide California Receipt Service to new shippers. The FR Shippers request that the Commission require El Paso to modify its tariff to include both conditions. The Commission will require El Paso to clarify its tariff to state that service to new shippers shall be available only if El Paso can provide that service without adversely affecting service to existing shippers, i.e., not subject to a prior claim. As for the requirement to file new shipper contracts, however, the Commission finds that El Paso is bound by the condition set forth in the December 26 Order and need not reflect this filing requirement in its tariff.

53. The FR Shippers further state that the description of California Receipt Service in Section 4.9 of El Paso's GT&C is confusing in that the Availability section that precedes Section 4.9(a) refers to "backhaul displacement" while Section 4.9(e) refers to "displacement or exchange." The Commission agrees and directs El Paso to modify Section 4.9 to use consistent terminology.

C. Partial Reservation Charge Credit

54. The December 26 Order required El Paso to modify its partial reservation charge credit tariff provisions to more narrowly define the circumstances in which credits are inapplicable, to provide for credits during Cycles 2 and 3, and to more narrowly define the circumstances where failure of a shipper to comply with the tariff and TSA would make it ineligible for reservation charge credits. El Paso has modified Sections 5.1 and 5.2 of its GT&C to comply with the Commission's directives.

1. Service to a Higher Priority Shipper

55. El Paso has revised Section 5.1(d) of Rate Schedule FT-1 to state that credits will not be payable to a firm shipper that is unable to schedule to a receipt or delivery point as a result of that point being fully scheduled on a firm basis to a higher priority shipper when the inability to schedule is not due to a mainline capacity shortfall. El Paso cites paragraph 38 of the December 26 Order where the Commission agreed that a firm shipper with alternate rights would not be eligible for a credit if that point were already fully utilized by a shipper using primary rights. Thus, El Paso states, a shipper would not

receive a credit if it could not be scheduled because it had inadequate priority at that point. However, El Paso confirms that the shipper would receive a credit if no mainline capacity were available for it to schedule to other receipt or delivery points.

56. PG&E and Indicated Shippers protest that El Paso's proposed language remains overly broad and ambiguous and does not define "higher priority shipper." PG&E states that if El Paso intended "higher priority shipper" to mean a shipper holding primary contract rights to a delivery point, it should clarify the tariff. PG&E further asserts that the provision should not include an exception to an exception and that the reference to mainline capacity fails to include receipt or delivery point shortfalls. Similarly, Indicated Shippers request that the double negatives be removed and the language modified to state: "Reservation charge credits are not applicable if the shipper is able to schedule its gas using alternate receipt and/or delivery points, if the use of alternate receipt and/or delivery points is provided in the shipper's contract." In the alternative, Indicated Shippers request that El Paso revise its tariff to state that reservation charge credits shall not be applicable "to a firm shipper that is unable to schedule at a receipt or delivery point due to that point being fully scheduled on a firm basis to a shipper using that point on a primary firm basis and where such inability to schedule is not due to a capacity shortfall."[23] PG&E requests that the provision be modified to provide that reservation charge credits shall not be applicable to "[a]n alternate shipper that is unable to schedule to a delivery point because that delivery point has been fully scheduled on a primary basis in an earlier scheduling cycle by the shipper holding primary contract rights to that point."

57. El Paso replies that its "higher priority shipper" tariff language is consistent with the December 26 Order and should be approved. El Paso argues that Indicated Shippers' suggestion to substitute "primary" or "alternate" for "higher priority" fails to recognize that there are circumstances in which alternate shippers have priority over primary shippers, such as where an alternate shipper is scheduled in a prior cycle and cannot be bumped by a primary shipper or another alternate shipper in a later cycle.

58. The Commission finds that El Paso's proposed revision to Section 5.1(d) remains ambiguous and should be clarified. The Commission agrees that removal of the double

[23] Indicated Shippers also argue that reservation charge credits should not be limited to situations in which there is a mainline constraint, but should also be applicable where there is a lateral constraint. El Paso responds that it is inappropriate to require reservation charge credits when laterals are constrained. As discussed above, the Commission has determined in response to the requests for rehearing that reservation charge credits must be paid when El Paso cannot provide service to firm shippers on lateral lines.

negative will make the provision more clear. The Commission finds that language such as that suggested by Indicated Shippers will provide a clear statement as to when reservation charge credits are due. Since Section 5.2 already refers to "capacity shortfall," Section 5.1 need not. The Commission therefore directs El Paso to replace Section 5.1(d) with language to provide that reservation charge credits are not applicable if the shipper is able to schedule its gas using its alternate receipt and/or delivery points.

2. Cycle 3 Nominations

59. The December 26 Order directed El Paso to modify language relating to reservation charge credits for Cycle 3 nominations. El Paso states that it has revised Sheet No. 111C to remove the qualification that reservation charge credits will not be payable when the inability to schedule in Cycle 3 is the result of previously scheduled firm transportation that cannot be bumped in Cycle 3. El Paso states that credits will be applicable in Cycle 3 whenever El Paso is unable to schedule due to a mainline capacity shortfall. The Commission finds that El Paso has satisfactorily complied with the Commission's directive.

3. Failure of Shipper to Meet Its Obligations

60. The December 26 Order directed El Paso to remove from Section 5.1(a) the language that provides that reservation charge credits will not apply when El Paso's inability to schedule the shipper's volumes is due to the failure of the shipper to comply with the tariff. Alternatively, the Commission stated that El Paso may propose language that more narrowly defines the circumstances in which failure of a shipper to comply with the tariff and TSA would make it ineligible for reservation charge credits.

61. El Paso revised Section 5.1(a) of Rate Schedule FT-1 to provide that reservation charge credits will not apply when El Paso's inability to schedule is due to force majeure or when a shipper: (1) fails to properly nominate or confirm pursuant to the scheduling timeline (Section 4.1 of the GT&C) and scheduling provisions of the tariff; (2) underdelivers gas to El Paso and adversely affects system integrity pursuant to Section 4.3 of the GT&C; (3) fails to deliver gas that conforms to the quality specifications detailed in Section 5 of the GT&C; or (4) does not comply with an unauthorized overpull penalty alert pursuant to Section 20.12 of the GT&C. El Paso states that the Commission discussed, in paragraph 44 of the December 26 Order, examples of when credits would not be applicable. El Paso states that it has incorporated those examples into Section 5.1(a).

62. Indicated Shippers question why shippers are held responsible for underdelivering gas when El Paso has operational balancing agreements at all of its major pipeline interconnects, and the interconnect operators, not the shipper, control the volumes into El Paso's system. Section 4.3 of the GT&C provides that El Paso will contact the interconnect operator in the event of shortfalls to increase or reduce deliveries. If the

interconnect operator fails to comply, El Paso can limit volumes. Indicated Shippers concludes that there is no basis for penalizing shippers by withholding credits if the interconnect operator fails to comply, since the shipper has no control over the delivery and El Paso has the means to cure the problem. Indicated Shippers also object to proposed Section 5.1(a)(iv) of Rate Schedule FT-1, which excludes shippers who do not comply with an unauthorized overpull penalty alert from receiving reservation charge credits. Indicated Shippers state that a shipper's failure to comply with an overpull penalty alert has nothing to do with capacity constraints.

63. El Paso replies that its proposed revisions mirror the Commission's directives and should be approved. El Paso states that the Commission has already explicitly approved these specific situations as examples of when a credit would not be appropriate because a shipper had not met its obligations under the tariff or its firm TSA. El Paso states that Indicated Shippers are reading the term "operator" too narrowly; an "operator" is not just an interconnect operator, but the person or entity that controls the flow of gas into El Paso's system (Section 1.7 of the GT&C). El Paso states that, to the extent that person or entity is a shipper or is acting at the shipper's direction, the shipper must be responsible for underdeliveries into El Paso's system that adversely affect system integrity. Similarly, El Paso states that if a shipper, or an interconnect operator acting on the shipper's behalf, fails to follow an overpull penalty alert, that shipper should not be rewarded by collecting credits when El Paso is unable to schedule its volumes.

64. The Commission agrees that it is important for shippers to comply with their TSAs and the pipeline's tariff. It is appropriate for a shipper to be ineligible for reservation charge credits in the situations listed in Section 5.1(a), consistent with the Commission's finding in the December 26 Order.

The Commission orders:

(A) The requests for rehearing are denied and the requests for clarification are granted as set forth in the body of this order.

(B) El Paso's compliance filing is accepted effective November 1, 2002 subject to the conditions set forth above.

(C) El Paso is directed to refile tariff sheets to comply with this order within 15 days of the issuance of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

APPENDIX

Tariff Sheets Submitted to Comply with December 26, 2002 Order
Second Revised Volume No. 1-A

Substitute First Revised Sheet No. 113B
Substitute Original Sheet No. 113C
Substitute Original Sheet No. 219E

Tariff Sheets Accepted Without Changes by the December 26, 2002 Order
Second Revised Volume No. 1-A

Twenty-Fourth Revised Sheet No. 20
Fourth Revised Sheet No. 21
Twenty-Ninth Revised Sheet No. 24
Fifth Revised Sheet No. 25
Twenty-Third Revised Sheet No. 26
Twenty-Third Revised Sheet No. 27
Eleventh Revised Sheet No. 38
Original Sheet No. 39
Original Sheet No. 40
Original Sheet No. 113D
Substitute Eighth Revised Sheet No. 202B
Third Revised Sheet No. 287